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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID MATTHEW GARCIA,

Defendant and Appellant.

H021418
(Santa Clara County
Super. Ct. No. 208590)

A jury found appellant guilty of two counts of assault with a deadly weapon with one allegation of infliction of great bodily injury and one count of petty theft with a prior conviction. (Pen. Code, §§ 245, subd. (a)(1), 12022.7, 666.) The jury was unable to reach a verdict as to one count of grand theft by false pretenses. (Pen. Code, § 484/487.) Appellant admitted an enhancement for committing the offenses while out on bail (Pen. Code, § 12022.1), the prior conviction element of the theft charge, one strike (Pen. Code, §§ 667, subds. (b-i), 1170.12), a prior serious felony (Pen. Code, § 668, subd. (a)) and three prior prison terms (Pen. Code, § 667.5, subd. (b)). The trial court sentenced appellant to 25 years and 4 months in prison. On appeal, he contends the trial court erred when it prohibited his defense counsel from arguing self-defense as to one of the assault charges and ruling it would not give self-defense jury instructions as to that count. He further contends the trial court erred in giving CALJIC 5.44 and denying his request for a different instruction, that there was insufficient evidence of theft to support the theft conviction, and

that the court erred in failing to instruct sua sponte on a lesser included offense to the theft count. We reverse.

The testimony presented at trial concerned an incident in a Mervyn's parking lot on Sunday, September 6, 1998, around 6:30 p.m. Earlier that day, Jose Luis Rodriguez Almanza (hereinafter "Rodriguez") and Ignacio Ortega (hereinafter "Ignacio") were socializing and drinking beer at Rodriguez's home with several other friends.[1] These friends included Eugenio Lopez, Manuel Rangel, Ramon Espitia, Eduardo Lopez and Salvador Rosas. Most knew each other from their hometown in Mexico. They decided to go to Mervyn's to purchase a gift to present at a baptism later that evening. Some of the group left for Mervyn's in Lopez's red pick-up truck. Others drove with Rodriguez in his blue Camaro.

Ignacio Ortega testified he drove from Rodriguez's house to Mervyn's in his red pick-up truck, accompanied by Eugenio and Manuel. As he was driving through the parking lot, he saw some "[s]ome guys . . . [o]n the sidewalk on the side of the store." This group of three, which included appellant, "were coming across the street like they were going to cross the street." Appellant said some "bad words" to Ignacio and his group, "[l]ike motherfucker, Mexicans something." Ignacio parked and he and his companions got out of the truck. They walked to the back of the truck. Ignacio saw that appellant "was making signs at us. . . . Like looking for trouble." Ignacio testified appellant "[w]ith his hands he was saying like what's up, what's your problem?" In response, Ignacio gestured "[w]ith my head I was telling him no, nothing." Appellant came to where Ignacio and the others were. "He was telling us some things in English that we did not understand, but he kept repeating what's up, what's your problem." Ignacio testified "I was surprised. I didn't know what he wanted. I didn't know if he wanted to fight with us or what."

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[1] In an attempt to be consistent with the testimony at trial, we will refer to some witnesses by their first names and others by their last names.

Appellant walked quickly back to his car and squatted. The two people with appellant were standing outside the car, one on each side. Ignacio did not see his friend Rodriguez arrive or park. Ignacio testified "I was walking, like I said, and then I turned to look where the defendant was and I saw that he squatted. Then I turned to look toward Mervyn's again and somebody yelled, watch out, he's got a knife. And by the time I turned to look again, I saw him in back of [Rodriguez], and he was stabbing him." "After he stabbed [Rodriguez], he came after me. He tried to stab me, too." "I ran. I ran and took off my belt. And then when I saw that he was really close to me to the point that he could stab me, I turned around and went like this with my belt . . . ." He didn't know if he hit appellant with his belt. Ignacio fell down and appellant stopped. Appellant left quickly in his car. Salvador and Bernardo took Rodriguez to the hospital, while Eugenio, Ramon and Manuel stayed to talk to the police. The police arrived in five minutes or less.

At trial, Ignacio acknowledged that at the preliminary examination he testified he "got angry a little" when appellant swore at him. He said Eugenio became angry as well.

One confusing aspect of Ignacio's testimony concerned whether another friend named Miguel was present during the initial exchange with appellant. On cross-examination, Ignacio said he did not remember a series of questions and answers at the preliminary examination concerning a third vehicle driven by Miguel: "Miguel arrived with Jose[?] . . . No. . . . Miguel was with you the whole time? . . . Neither. . . . So Miguel arrived some time later? . . . He arrived before us, and he was parked somewhere around."

Ignacio did not remember testifying at the preliminary examination that when appellant was swearing at them "a friend arrived and he said what's happening." When asked which friend arrived, Ignacio answered "Miguel." At trial, Ignacio testified "It was Manuel who was next to us. . . . [¶] I don't remember, but I think it was Manuel. There was no Miguel there."

Ignacio testified that he and his friends never stood close enough to appellant to touch him. He was questioned about a passage in the preliminary examination transcript:

"You were asked, did you say that Jose[Rodriguez] was also trying to see if there were any problems at some time when you were talking with the three young men? And your response was, the one that I said that his name [is] Miguel was the one who got close and he hit him." Ignacio responded "Miguel never came close. It was Manuel, the one that was to the side." In discussing the transcript, the trial court said "This witness has indicated that he did not use the name Miguel. Miguel was not the name that he used. It was Manuel. It may be a reporter's error. It may have been misinterpreted[.]" The court reporter's testimony undermined this view.[2]

At trial, Ignacio testified he has a cousin named Miguel, who lives in Los Angeles, who is a different person from Manuel, who is not related to him. Ignacio was asked about testimony during the preliminary examination in which he was asked "After you tried hitting [appellant], did [appellant] run somewhere?" and Ignacio answered "No, because my cousin Miguel said let's go back to the cars, there's no problem." When asked about this previous testimony, Ignacio said at trial "I don't remember having said Miguel was there." During the preliminary examination, the court asked Ignacio if Miguel/Manuel hit appellant and Ignacio answered that appellant was "hitting [Miguel/Manuel] because [Miguel/Manuel] stretch his hand out to him saying that there was no problem." When asked at trial if he denied saying this, Ignacio answered "I don't deny, but things didn't happen that way because Manuel didn't stretch his arm."

Ignacio was asked about the following preliminary examination testimony: "[D]id any of you pull out your belt buckles before [appellant] picked up the knife? And [Ignacio responded], when he hit [Miguel/Manuel], I pulled mine . . . ." Ignacio testified at trial "I

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[2] The court reporter for the preliminary hearing testified she was 100 percent certain that defense counsel's 16 references and Ignacio's 12 references were to Miguel and not Manuel. She testified Manuel's name did not appear. As a court reporter, Miguel and Manuel had two very distinct sounds. The phonetic strokes for the two names differed significantly.

sort of remember that question. And I also remember that I told them that I took the belt off when [Rodriguez] was stabbed." Ignacio was asked about another question and answer at the preliminary examination. "[Y]ou were asked . . . [']so before [Rodriguez] was stabbed, you had already pulled out your belt buckle; is that correct?['] And you responded, [']Yes.[']" Ignacio said he didn't remember testifying that way and denied taking out his belt buckle before Rodriguez was stabbed. Further inconsistent preliminary examination testimony was that Ignacio pulled out and swung his belt buckle threateningly at appellant. Ignacio was not sure whether his inconsistent preliminary examination testimony that Rodriguez's blue Camaro hit appellant's car was true.

Rodriguez testified Ramon, Eduardo and Salvador were in his blue Camaro with him.[3] He said Ignacio was already at Mervyn's when he arrived. He testified appellant "came up behind me and he knifed me." Rodriguez had no weapons and had not spoken to appellant, nor had appellant spoken to him. He testified he was stabbed "five, six minutes" after getting out to the car and walking toward Mervyn's, but also testified he was stabbed "two minutes, max" after getting out of the car. Rodriguez felt pain and sat down. He said "[a]fter [appellant] knifed me, he took the knife out of me and went after Ignacio." Appellant was swinging the knife at Ignacio, who was running. Rodriguez testified "[Ignacio] was running and he took his belt out. . . . [Ignacio] was hitting him with the belt so that he wouldn't come close to him." He didn't know or remember whether Ignacio hit appellant with the belt. He said appellant then got in his car and left. He testified "[b]efore they left,

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[3] He testified as follows:
"Q How did you get there?
"A I drove my car.
"Q Was there anybody else with you in your car?
"A Yes.
"Q Who was that?
"A Ignacio Ortega.
"Q Now, was Ignacio in your car, or did he get there in a different car?
"A Ignacio got there in another car."

my friend put his car in back of his." Rodriguez's friend Salvador drove him in Rodriguez's car to the hospital, where he remained for two days. Rodriguez testified he had never seen appellant before that day, had no tattoos, and claimed no gang affiliation.

On cross-examination, Rodriguez testified that when he arrived at Mervyn's his friends Eugenio, Manuel and Ignacio were standing in the parking lot waiting for him. He didn't hear any arguing or yelling. After he was stabbed, Salvador parked his car behind appellant's. Rodriguez did not hear a crash or bang. He didn't see any damage to appellant's car, it was "perfectly fine."

Ramon Espitia testified he arrived at Mervyn's in Rodriguez's blue Camaro. He got out of the car and walked "to get to where the other guys were." Espitia "heard that somebody yelled that something was happening. And then I turned around and [Rodriguez] was already bleeding." He then saw appellant following Ignacio while moving the knife in an up-and-down motion. He testified "Ignacio was running. I really don't know how it happened that [Ignacio] hit [appellant] with the belt." Ignacio fell down. Appellant "kept on running and got in the car." As he ran, appellant put his hand to his head and looked as if he was bleeding from his ear. Espitia saw Salvador put the Camaro behind appellant's car. He didn't hear any sound of the cars crashing and did not see the red pick-up truck move. Appellant left and Espitia went to call 911. By the time the police arrived, Rodriguez had left for the hospital.

The responding police officer who interviewed Espitia through an interpreter testified Espitia said Rodriguez "along with the witnesses, had exchanged some words with [appellant.]" He said Rodriguez "and all of the witnesses were afraid of [appellant] pulling out a weapon. They began to run away from [appellant]." The officer said Espitia told him that appellant chased after Ignacio first, and then Rodriguez.

Manuel Rangel testified he arrived at Mervyn's in the red truck driven by Eugenio.[4] Ignacio arrived later with Salvador and Rodriguez. Rangel testified that he stood at the front of his red truck, and the blue Camaro arrived. The four occupants of the Camaro got out of the car and walked toward Rangel.

Rangel saw appellant get out of his car and heard him yell something in English at Rangel's friends. He said as appellant was talking to Ignacio he was "very aggressive, wanting to fight." He came to within three steps of the group. He saw appellant run back to his car and get the knife. He saw Ignacio take off his belt when appellant chased him with the knife. Rangel testified appellant first chased Ignacio, then chased Rodriguez.

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[4] Rangel's testimony concerning the trip to Mervyn's was as follows:

"Q Who did you go with?
"A With Eugenio Rosas.
". . .
"Q And who else were you with?
"A Eugen[io], Ramon, there was just three of us.
"Q Now, were you also with Ignacio?
"A They arrived a little bit later.
". . .
"Q Okay. Did you go there in a car?
"A In a red truck.
". . .
"Q . . . . Can you remember now a year later whether or not Ignacio was with you?
"A Yes, Ignacio was with me."

On cross-examination, Rangel testified as follows:

"Q . . . [Y]ou went from [Rodriguez's] house to Mervyn's with the following people: Yourself –
"A Eugenio and three other people. Just three.
"Q Three people and then yourself to make a total of four?
"A No, just three.
"Q Okay. Who was with you?
"A Eugen[io], myself and Ramon [Espitia].
"Q And that is it?
"A Yes, just three.
"Q So Ignacio went in the blue Camaro with [Rodriguez]?
"A Yes, with [Rodriguez]."

Chaz Pfeffer testified that on September 6, 1998, he lived near Mervyn's and was watching television in his living room when he heard tires squealing. He looked out a window toward the Mervyn's lot. He saw a Ford Bronco crash into another car. Five people "were throwing stuff" "[a]t this one guy." He didn't see anyone with a knife or see anyone get hurt. He told his mother.

Pfeffer's stepfather, Rodrigo Bejarano, a retired Marine, overheard Pfeffer talking to his mother, Bejarano's wife. He went to look out the window toward the Mervyn's lot. He testified, "I saw approximately four men, and I continued to see the other guys, but a blue car and another vehicle or something taken off, and these other four men were swinging belts at somebody." From a distance of "75 yards at the most" he saw "four people rushing somebody with belts and yelling in Spanish, cuss words at him and stuff. And I guess they were hitting him. I don't know. I couldn't see because they were all bunched up and swinging left and right and going around in circles." In Spanish they were saying "get the mother fucker."

Bejarano testified the people who were swinging their belts were wearing cowboy boots. The belts had big silver buckles at the end. Bejarano called the police while he was watching the fight. Bejarano testified that a picture of Rodriguez looked like one of the people swinging belts. He didn't see anyone get stabbed, but he "saw two people, one had blood in his head and one with blood [o]n his back." Someone in the group said, in Spanish, in reference to the person with blood on his back, "Let's get him the fuck out of here . . . and maybe take him to a hospital . . . ." He heard sirens and then saw two cars, a Bronco and a blue car, leave the parking lot. The person who was attacked probably got into the blue car. The men in cowboy boots drank some beers and threw the cans underneath the red pick-up truck before the police arrived. When Bejarano was interviewed by an investigator with the District Attorney's office, he referred to the group in cowboy boots as "border brothers."

Bejarano explained: "The only one reason I called 9-1-1 is because that one man was holding a baby, and he was inside the bunch of people, running with the bunch. And I was

afraid he was gonna get hurt or the baby would get hurt. There was a guy there holding a baby when all of this is going on and him walking around those people." When asked how long he was watching, he answered "[y]ou could probably find that out from the police report. I was on the phone talking to the police, telling them what is happening. You could find out from them. Minute or two."

San Jose Police Officer Paul Chrisman testified as a gang expert. One item of evidence was a Mervyn's security tape of appellant and his two companions in the store immediately before the incident.[5] Chrisman reviewed the videotape which shows appellant with a norteno tattoo on his chest, a huelga bird and an ene on his arm, Spanish spelling for the letter "n". Chrisman testified these were reflective of norteno gang alignment. He testified Rodriguez's clothing, the traditional Mexican cowboy look, was called border brother clothing. He said most nortenos viewed Mexican nationals as associated with rival sureno gang members.

Dr. Tzuoo-Ming Yeh testified he treated Rodriguez who had a deep stab wound in his back which penetrated the muscle so deep that he had to do surgery to stop the bleeding. Dr. Yeh noticed the odor of alcohol on Rodriguez. A blood sample taken from Rodriguez at 7:20 p.m. determined his blood alcohol level to be .103. Rodriguez had testified he drank two beers before going to Mervyn's. A forensic pathologist testified that if a person had several beers an hour beginning at 4:00 p.m., stopped drinking at 6:00 p.m. and had a .103 blood alcohol level at 7:20 p.m., he consumed about 8 beers between 4:00 and 6:00 p.m. A correlation existed between alcohol and violence.

Other testimony disclosed that about 8:10 that night, appellant presented himself at the Kaiser Hospital emergency room and gave the name Anthony Moreno, with a Kaiser

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[5] In this tape, appellant is shirtless, as is one of his companions. The other shoppers are dressed for warm weather. Appellant walks around the store, kisses his employee girlfriend, chats with his friends, peruses the merchandise, and appears to buy a shirt. He is smiling and seems relaxed.

health plan number. He was treated for his lacerated, bleeding ear that he said he sustained in a fall. The doctor treating him described him as "respectful to the staff, he was quite clear-headed, and quite appropriate in terms of demeanor, behavior, attitude, and the like." The ear laceration went completely through the hard cartilage of his ear. Plastic surgery repaired the ear, which needed four or five deep stitches and four or five external stitches. The injury could have been caused by a knife. It could have been caused by a belt buckle. A San Jose Police officer arrived. Appellant appeared nervous and surprised to see the police. He denied being at Mervyn's or being involved in an altercation there. After appellant was treated, he was transported to jail.

Another witness testified that appellant borrowed a blue Honda Civic in the first week of September 1998. The following day, the back end was smashed, the tires were flat, a bloodied rag was inside the car and the dented trunk could not be opened.

The court ruled it would give self-defense instructions, but apparently limited those instructions only to count one, the assault on Ignacio, but not count two, the assault on Rodriguez. The court repeatedly blocked any attempt by defense counsel to argue self-defense as to the count for which Rodriguez was the victim:

"[DEFENSE COUNSEL]: . . . When you get the instructions, I believe you are going to see there are two pages to nine, and this is on the second page. This is the District Attorney's burden, beyond a reasonable doubt. Not only do they have to prove that the act occurred, but they have to prove that the willful application of physical force upon the person of another is not unlawful when done in self-defense.

"Now, this double negative, this not unlawful. I used to go crosseyed reading through cases in law school as to when you see that double negative. What that means and the easiest way to figure out what it means is just to cross out the two negatives. And what you have is they have to show that -- [the prosecutor] has to show that what Mr. Garcia did -- actually, I am getting ahead of myself. If, what he did was lawful and was done in self-

defense, the People have the burden to prove that the application of physical force was not in lawful self-defense.

"The last part is the most important part. If you have a reasonable doubt that the application of physical force was unlawful, you -- if you think it might have been lawful, if you think that it may have been in self-defense –

"[THE PROSECUTOR]: Objection , your Honor. We covered this.

"THE COURT: Sustained."

Counsel continued to try to argue the applicability of the self-defense instructions to the testimony about Rodriguez:

"[DEFENSE COUNSEL]: . . . Now, another thing that the law says is that you don't have to turn the other cheek. This is jury instruction 5.50. You are going [to] have this in the back. A person threatened with an attack that justifies the exercise of the right of self-defense need not retreat.

"To put that to the facts, once the belts were struck at him, he was justified in not retreating and using the knife. In the exercise of his right to self-defense, a person may stand his ground and defend himself.

"What that means is even though most of us – if somebody got us upset, we turn the other cheek. We would walk away and let it go. But the law would say that if we had been attacked or if we perceived that people were coming after us because of the number and the belts that they saw, that they have the right to stand there and protect themselves.

"Now, what force can they use? They could use all force and means which would appear to be necessary to a reasonable person in a similar situation and with similar knowledge.

"Well, if you saw you are outnumbered and you saw they were bigger than you – and I don't know if Jose Rodriguez looked visibly drunk –

"[THE PROSECUTOR]: Objection. Self-defense as to Mr. Rodriguez. There is no facts [*sic*] in which counsel could argue that.

"[DEFENSE COUNSEL]: Yes, there are, your Honor. And I am getting upset with counsel saying that, placing this in the jury's mind. There are facts –

"THE COURT: I already ruled on that.

"[DEFENSE COUNSEL]: And, your Honor, if the evidence – if I feel the evidence points to –

"[THE COURT]: Well, you could feel that, but I don't think at this point that is a legitimate argument that could be made from the evidence before the jury.

"[DEFENSE COUNSEL]: If you feel that Mr. Rodriguez was present at the scene, which he was, and if you feel that he may have been one of the people with the belts --

"[THE PROSECUTOR]: Objection, your Honor. Speculation.

"THE COURT: Your argument is speculation, so adhere to my ruling, please.

"[DEFENSE COUNSEL]: We know that four guys had belts because we heard from Mr. Bejarano. We know that there were anywhere from four to seven people there, maybe more. We don't know because I don't think we came to that equation.

"Is it fair to say when four Spanish speakers are swinging belts, that is, one of them may have been Jose Rodriguez, is that a fair inference that you could make from the evidence? Yes.

"[THE PROSECUTOR] Objection, your Honor. We went through this already. I would ask the jury – that the court tell the jury what the court's ruling was because counsel --

"THE COURT: Why don't you both approach."

Discussing appellant's small stature compared to the others and Bejarano's testimony concerning the group of men swinging belts, defense counsel argued:

"[DEFENSE COUNSEL]: . . . Would all of those things make a reasonable person think that they might be clobbered, that they would have to protect themselves from being clobbered?

"[THE PROSECUTOR]: Objection, your Honor, as Mr. -- . . .

"[DEFENSE COUNSEL]: It is up to the jury now.

"THE COURT: As I indicated, counsel can argue credibility, burden of proof with regard to that, but not self-defense."

Appellant contends "The trial court's entire prohibition of defense counsel's closing argument that self-defense applied to Rodriguez denied appellant the full and fair opportunity to participate in the adversary factfinding process, his right to be heard in summation on the evidence from the point of view most favorable to him, and the assistance of counsel constitutionally guaranteed by the Sixth and Fourteenth Amendments, which requires the entire judgment's reversal and further had a substantial and injurious influence on the tainted verdicts obtained."

"A criminal defendant has a well-established constitutional right to have counsel present closing argument to the trier of fact. [Citations.]" (*People v. Marshall* (1996) 13 Cal.4th 799, 854.) "This is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He [or she] may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He [or she] may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he [or she] must have broad discretion. [Citations.]" (*Herring v. New York* (1975) 422 U.S. 853, 862; see also Pen. Code, § 1044.)

The trial court must instruct on defenses which are supported by the evidence and which are not inconsistent with the defendant's theory of the case. (See *People v. Barton* (1995) 12 Cal.4th 186, 195.) When assessing the sufficiency of evidence to warrant an instruction, we do not evaluate the credibility of witnesses, a task for the jury. *(People v. Breverman* (1998) 19 Cal.4th 142, 162-164.)

"The trial judge ha[s] a responsibility to correctly instruct the jury and limit argument to defenses supported by substantial evidence." (*People v. Ponce* (1996) 44 Cal.App.4th

1380, 1386.) In *Ponce*, defense counsel argued, during closing argument, that the defendants had been "framed." The prosecutor asked the trial court to instruct the jury that there was no evidence to support such a defense theory. The trial court did so. On appeal the court concluded the trial court had not erred, because there was no substantial evidence that the defendants had been "framed." "In the absence of such evidence, the trial court had a duty and right to preclude defense counsel from pursuing such argument." (*Id*. at p. 1390.)

Unlike *Ponce*, in which the argument that the defendant was framed was based entirely on speculation, the self-defense argument here was based on conflicting evidence about the assaults. Although the prosecution's view of the evidence was amply supported, there was also evidence from which a rational jury could conclude that appellant was defending himself from an attack in which he was outnumbered by larger men swinging belts at him. Defense counsel was attempting to argue that appellant's acts were in self-defense, that he was actually in fear of his life or serious bodily injury and that the conduct of Rodriguez and his friends was such as to produce that state of mind in a reasonable person. Direct and circumstantial evidence supported a reasonable inference that Rodriguez was one of the belt-wielding attackers Bejarano described. Bejarano identified a picture of Rodriguez as looking like one of the attackers swinging a belt. Rodriguez testified he was wearing cowboy boots and a square belt buckle. Rodriguez's companions differed in their testimony concerning whether appellant assaulted Ignacio or Rodriguez first. Ignacio testified at the preliminary examination he took off his belt when appellant and Manuel/Miguel made contact. The extent of the witnesses' testimonial inconsistencies in describing the events make parsing this rapidly unfolding scene into discrete intervals during which self-defense applies to part but not all a highly problematic undertaking. Having determined that self-defense instructions were warranted, the trial court should have permitted defense counsel to argue which parts of this confusing body of evidence supported the applicability of the instructions to each assault. The trial court erred in restricting defense counsel's argument.

The parties differ in their categorization of this error and the resultant standard of review. Appellant urges this court to apply a reversible per se standard. Appellant further contends that the error requires the entire judgment's reversal. He argues "the prosecutor exploited the error in closing summation to argue that the defense unfairly advocated and misleadingly sought to create an illegal defense." He points to the following argument by the prosecutor in rebuttal:

"[THE PROSECUTOR]: . . . Ladies and gentlemen, this isn't a football game. This is a very serious situation, one that I take seriously. And when you hear me stand up and object, it is not because I want to be mean to the defense attorney or because I want to be inflammatory or do anything like that. It is because the People are entitled to a fair trial, and I have to protect, as a deputy district attorney, the People of this community and their right to a fair trial. And the defense has not played fair in this trial. The judge told the defense attorney he may not argue self-defense with respect to the stabbing of Jose [Rodriguez.] Yet, he repeatedly ignores that. And the reason why he repeatedly ignores that is because he does not have a defense. The defendant has no defense to stabbing Jose in the back. [¶] And the defense attorney keeps trying to create some sort of illegal defense out of whole cloth and keeps trying to mislead you."

Only those fundamental violations of right to counsel are reversible per se. "[T]here is a strong presumption that any other errors that may have occurred are subject to harmless-error analysis" (*Rose v. Clark* (1986) 478 U.S. 570, 579), and reversal of convictions based upon closing argument error has occurred only in the most extreme cases. (*Herring v. New York, supra,* 422 U.S. 853, 858 [conviction reversed where trial court prohibited defense counsel from presenting closing argument in a criminal court trial]; *In re William F*. (1974) 11 Cal.3d 249 [juvenile jurisdictional finding reversed when court prohibited closing argument].) Counsel was not completely prohibited from making a closing argument. However, even accepting respondent's view that "[i]f error, it was an

instructional one subject to harmless error analysis," reversal of counts one and two is required.

Bejarano testified Rodriguez looked like one of the men swinging their belts at the surrounded man. The jury clearly considered Bejarano's observations important in trying to determine what occurred. Bejarano testified he was on the phone with the police narrating his observations. During deliberations, the jury sent a note asking "Are the transcripts of the 2 - 911 calls available as evidence."

Before trial, the court considered whether to admit the Mervyn's videotape of appellant in the store just before the incident. The prosecutor argued for its admissibility saying "we think it's important for the jury to see, because the defense now wants to claim that . . the victims approached these three outside, and was actually -- were actually the instigators of the altercation. We think it's important for the jury to see that no one in our view would ever approach these three individuals as ominous as they look, and be -- start an altercation."

The court ruled after "hearing the various theories of presentation of the case to the jury." "The Court finds it very probative to see exactly what Mr. Garcia and his friends looked like at the time just before the situation occurred outside that brought about these charges, and it is a question of fact that will have to be -- that's going to be present and has to be decided by the jury, who was the initiator. Were the defendant and his friends intimidating such that the named victim would not have attacked them in the way that the defense is going to say it happened, that they came after Mr. Garcia and his companions after this -- some incident in the parking lot? So I think it is very probative on that issue."

Thus, while acknowledging that it was a "question of fact that . . . has to be decided by the jury, who was the initiator," and deciding to give self-defense instructions, the court then refused to allow the defense to argue precisely the issue those rulings defined. This ruling permitted the prosecutor to interrupt defense counsel's argument concerning self-defense repeatedly, and to accuse defense counsel of deliberately trying to mislead the jury.

This seriously impaired defense counsel's ability to argue self-defense as to the Igancio count as well, because the factual scenarios for each count were so closely connected. The court's ruling and the prosecutor's argument would undoubtedly cause the jury to develop a skeptical view of appellant's argument about the propriety and applicability of self-defense as to the Ignacio count as well. Although it may be, as respondent asserts, "the evidence that appellant assaulted Rodriguez was simply overwhelming," his reason for doing so is far from clear. Also unclear is the order in which the assaults occurred. Disallowing argument as to self-defense on one count would influence a decision as to self-defense on the assault count which either immediately preceded or followed the other. Thus, we cannot say the court's error was harmless or that it effected only one count of the charged assaults. There is a reasonable probability this error affected the result of each assault count in this case. Both count one and count two must be reversed.[6]

Counts three and four were so distinct from counts one and two in time and nature that the error could not have affected the jury's determinations as to those charges. Count three, for which the jury was unable to reach a verdict, was theft by false pretenses, and count four, of which appellant was convicted, was petty theft with a prior conviction for appellant's theft of medical services from Kaiser Hospital. The factual predicate for both counts stemmed from appellant's obtaining medical treatment from Kaiser Hospital in an amount over $400 by falsely claiming to be another person when he went to have his injured ear treated.

Appellant contends "the insubstantial evidence adduced of theft was insufficient as a matter of law to sustain count four's conviction and further violated the Fourteenth amendment due process clause." Appellant contends "the sua sponte omission to instruct the jury on count four's lesser included offense of attempted theft resulted in a miscarriage

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[6] In light of this, we do not reach appellant's argument concerning the sufficiency of the self defense instructions.

of justice." Respondent concedes that "It is clear from the testimony that Kaiser had a state mandated duty to treat appellant, no matter what his ability to pay. Thus, appellant's false impersonation, while it did not actually defraud Kaiser, attempted to do so." "As appellant recognizes, there is no crime of attempted petty theft with a prior conviction. . . . But he concedes that, under the facts here, he is guilty of attempted petty theft. He is correct." The parties ask this court to modify the judgment as to count four to reflect the crime of attempted petty theft. On remand, the trial court is instructed to so modify count four to reflect a conviction for attempted petty theft.

The judgment is reversed.

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Elia, J.

WE CONCUR:

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Premo, Acting P.J.

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Mihara, J.